STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
(Saad, P.J., and Sawyer and Hoekstra, JJ.)

JULIE A. PUCCI,

Plaintiff-Appellant,

v

CHIEF JUDGE MARK W. SOMERS, In his individual capacity,

Defendant,

and

19TH JUDICIAL DISTRICT COURT,

Garnishee Defendant-Appellee.
_____/

Supreme Court No. 153893
Court of Appeals No. 325052
Wayne County Circuit Court
LC No. 13-014644-CZ

PLAINTIFF-APPELLANT'S REPLY BRIEF

ORAL ARGUMENT REQUESTED

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INTRODUCTION

In its April 28, 2017 Order, the Court directed the parties to present argument on three issues which were addressed by Plaintiff-Appellant Julie Pucci ("Pucci") in her principal brief. Garnishee Defendant-Appellee ("Appellee") *for the first time* poses a new question not identified for review by the Court or argued below: whether the local funding unit has preemptive power over the district court's decision to adopt an employee indemnification policy for *any* personal capacity judgment. This argument was not presented in the lower court and has been waived.

This new argument is also contrary to the law. Under the Government Tort Liability Act ("GTLA"), both courts and funding units are governmental agencies. MCL 691.1401(a), (e). The pertinent statute, MCL 691.1408(1), contains no requirement that one governmental agency obtain pre-approval from another. The statute implicitly contemplates that taxpayer funds will pay for the obligation. This is always true. In addition, allowing a funding unit to veto a court's election to indemnify an employee is a *per se* violation of the separation of powers doctrine. [1]

ARGUMENT

A. A District Court Chief Judge Has Authority to Adopt an Employee Indemnification Policy on Behalf of a District Court Pursuant to MCL 691.1408(1) and MCR 8.110(c).

[1] This case demonstrates the competing interests between courts and their local funding units. On February 7, 2012, SCAO acknowledged a funding unit dispute concerning Appellee's decision to indemnify Somers and told Chief Judge Wygonik that he "was hereby authorized to proceed in whatever manner you conclude is in the best interests of the court, including commencing new litigation" pursuant to AO 1998-5. (Appellee Appx. 222b.) At that time, Appellee was represented by different counsel and agreed with Pucci that the indemnification policy was enforceable. (Appellee *Amicus Brief*, Appx. 137a.) This position was opposed by Dearborn who was (and remains) represented by the Miller Canfield Law Firm, the firm now representing Appellee. No lawsuit concerning funding has been filed against Dearborn and Appellee has adopted Dearborn's view of the indemnification policy. The Court can also take judicial notice of its own written communications with Dearborn which vividly illustrate the conflicting interests between the court and its funding unit. Perhaps, this is why the City of Dearborn never moved to intervene and protect its own interest. It has no need. Appellee is doing that for them. The danger of unconstitutional encroachment by Dearborn into the affairs of Appellee is not theoretical, it is real.

In its response, Appellee makes little mention of the pertinent statute. Chief Judge Richard Wygonik elected to indemnify Somers specifically for the *Pucci* judgment *after* it was fixed, the triggering event identified in the statute. (Appx. 241a). This decision bound Appellee to assume financial responsibility for the judgment.[2]

In its new argument, Appellee erroneously contends that its indemnification policy is unenforceable because the City of Dearborn did not first approve it. Appellee and Dearborn are separate governmental agencies under the GTLA. MCL 691.1401(a), (e). One is from the judicial branch and the other from the legislative. Nothing in MCL 691.1408(1) suggests, let alone requires, that a governmental agency from one branch obtain approval from an agency in any other. If the Legislature required such approval as a condition for indemnification, it would have said so. It did not.

A chief judge is the "director of administration of the court" with full authority and control over *all* matters of administration and the only person authorized to speak for the court. MCR 8.110(B)(1), (C)(2)(e) and (C)(3). The purpose of statutory indemnification ". . . is to permit local agency employees to perform their 'official duties' without fear of personal liability, whether pursuant to state or federal law, so long as the conduct is performed during the course of their employment" and within the scope of their authority. *Wiehagen v Borough of North Braddock,* 527 Pa 517, 594 A2d 303, 306 (Pa 1991) (municipality must indemnify a municipal employee found personally liable under *42 USC § 1983* where the employee was acting within the scope of his duties.)

The *Separation of Powers Clause* protects the independence of the three branches of state

[2] Appellee, without any evidence, gratuitously alleges that Judge Wygonik adopted the indemnification policy because he was a friend of Somers.

government. *Mich Const Art 3, § 2.*[3] In *Judicial Attys Ass'n v State,* 459 Mich 291, 296 (1998), this Court found unconstitutional a portion of a statute which required a court to share administrative responsibility for court employees with the local funding unit. This Court acknowledged the struggle between funding units and local courts concerning employment policies and practices but held that *chief judges have full authority and control over all matters of management and administration of court personnel.* [4] *Id.* at 299-302, n. 6 (1998).

This Court, *supra* at 302-303, reasoned:

> The judicial branch is constitutionally accountable for the operation of the courts and for those who provide court services, and must therefore be the employer of court employees. It is, of course, well established, both as a practical and a constitutional matter, that in the exercise of its employment responsibilities the judiciary must take into account the limited dollars appropriated to it by the legislative branch in the exercise of the Legislature's own constitutional responsibility. See, for example, *Bay Co,* 385 Mich. at 726-727, and *Ottawa Co, supra* at 603. *The practical necessity for the judiciary to reach accommodation with those who fund the courts on an annual basis, however, cannot, as a constitutional matter, be used as an excuse to diminish the judiciary's essential authority over its own personnel.*[5]

This includes the decision to indemnify court personnel for personal liabilities which result from official employment decisions. See, *Wiehagen, supra.* Appellee's argument that *only* the local funding unit can decide whether to indemnify a court employee is an unconstitutional encroachment upon the independence of the judiciary.

Appellee strays and erroneously states, "Ms. Pucci contends that the power to compel a court's funding unit to pay a liability belonging to someone else is the expression of this policy-making authority [under MCR 8.110(C)(2)(c)]." (Appellee BOA, p 10). The need to compel the

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[3] "The powers of government are divided into three branches: legislative, executive and judicial. No other person exercising powers of one branch shall exercise powers properly belonging to another branch as expressly provided in this constitution."

[4] The same type of conflict is expressed in a series of written communications between Dearborn's Mayor and this Court. (Appellee Appx. 216-220b.)

[5] The underscored portion was omitted by Appellee. (Underscore added.)

court's funding unit to pay a liability has never been an issue in this case. Appellee has never offered any evidence that it cannot satisfy the *Pucci* judgment from its existing budget nor was the issue even raised in the lower court. The question cannot and should not be considered for the first time on appeal. *Bek v Zimmerman*, 285 Mich 224, 230 (1938).

Ignoring the lack of any record on this issue, Appellee points to *46th Circuit Trial Court v Crawford County*, 476 Mich 131, 141 (2006), and argues that that the district court's adoption of an indemnification policy is an unlawful appropriation of funds from the local funding unit. *Crawford County* concerned the narrow situation in which a court seeks to exercise its "inherent power" to compel counties to provide funding where the trial court serving those counties "has not received sufficient funding to operate at a serviceable level." *Id.* at 160.

Unlike *Crawford County*, this case has nothing to do with a court's exercise of its "inherent power" to appropriate funds necessary to sustain services. Appellee has already said that monies to pay for the indemnification policy will come from the "coffers of the Court" and not from any additional source. (Appellee Response to Application, p 2.) See, *O'Neill v. Nineteenth District Court Judge William C. Hultgren*, p 2, n 2 (chief judge has power to "administer his budget" without approval from funding unit). Appellee has never offered any evidence that it cannot satisfy the *Pucci* judgment from its existing budget. There is no reason to believe otherwise.

Hypothetically, if a funding dispute were to materialize between Appellee and Dearborn, Administrative Order (AO) 1998-5 requires the chief judge to notify SCAO of the dispute. SCAO could then attempt to settle the dispute or authorize the court to initiate litigation. (AO 1998-5(1), (2).) This AO provides the necessary "checks and balances" which Appellee erroneously claims to be absent. Accordingly, should this Court reverse and enforce the indemnification policy, Appellee and Dearborn may avail themselves of the remedies contained in AO 1998-5 should any

funding dispute ever arise.

The heart of Appellee's argument is that its unilateral decision to indemnify Somers is unenforceable because payment for the policy will come from taxpayer dollars.[6] The statute, MCL 691.1408(1), contemplates that the taxpayer will ultimately foot the bill for a governmental agency's decision to indemnify *any* state employee.[7] This is also true with the judiciary and court personnel.

In *Cameron v Monroe County Probate Court*, 457 Mich 423 (1998), this Court held that the funding unit (i.e., the taxpayer) was ultimately liable for any judgment entered against a judge who violated an employee's civil rights. This Court reasoned:

> The county contends correctly, that employment discrimination is not an "expense of justice." However, supervision and administration of court personnel is a necessary expense of justice for which the county is expected to pay. The mediation judgment entered against the county is the result of poor or inappropriate administration. Just as the county would benefit from the wise and efficient administration of the judges its voters elect, so it suffers from the thoughtless and improper administration in the instant case.

Id. at 427-428. See also, *Anspach v City of Livonia*, 140 Mich App 403 (1985) ("The City of Livonia has a statutory duty to pay the cost of financing the 16th District Court, which would include any judgment plaintiff might recover against Judge McCann or the 16th District Court.") This Court has already held that the taxpayer must pay for judgments against its elected judges as a result of "their thoughtless and improper administration in the instant case."

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[6] Appellee makes no argument that it lacked the authority to unilaterally acquire liability insurance pursuant to MCL 691.1409. Indemnification policies are the functional equivalent of insurance policies. If the funding unit could veto a chief judge's exercise of his statutory authority under the GTLA to insure or indemnify, it would expose court administrators and employees to a seizure of personal assets to satisfy a judgment in their individual capacity resulting from conduct covered under MCL 691.1408(a). This could not have been what the Legislature intended.

[7] Acknowledging their obligation, Dearborn taxpayers funded the settlement of former Court Administrator Sharon Langen's suit against Somers concerning the same reorganization that cost Pucci her job. (*Amicus Brief,* Appx. 137a.)

B. A Chief Judge May Adopt a Policy That Indemnifies Court Employees for Liability Incurred in Their Individual Capacity.

A judgment against a public employee in his or her "official capacity" is actually one against the state for which indemnification is neither available nor necessary because the named individual faces no personal liability. *Monell v New York Department of Social Services,* 436 US 658, 690, n 55 (1978). It follows, therefore, that statutory indemnification is only available (and meaningful) when a public employee incurs personal liability in the performance of their job.

Appellee acknowledges that had the judgment against Somers been in his "official capacity" "the Court [not the local funding unit] would have already been required to satisfy it" without any "appropriation" or request from the funding unit. (Appellee BOA, p 17.) The same analysis applies to the court's indemnification policy for the *Pucci* judgment.

As in *Wilson v Beebe,* 770 F2d 578, 588 (CA 6, 1985), Appellee voluntarily agreed to assume Somers's personal obligation to satisfy the *Pucci* judgment. It is this legal obligation which is the subject of the *Writ.* MCL 600.4011; MCR 3.101; *Royal Oak Township v City of Berkley,* 309 Mich 572, 580 (1944); See generally, 6 Am Jur 2d *Attachment and Garnishment, § 2* (2013). Like the indemnification policy in *Wilson v Beebe,* the money to pay the obligation will come through taxpayer dollars.

Appellee makes the hyperbolic assertion that allowing it to indemnify Somers for his personal obligation to Ms. Pucci permits judges by judicial "fiat" to force "the Court to pay his monthly car payment…or pay off his student loans that he incurred to obtain his law degree on which his job depends." (Appellee BOA, p 18.) This argument is not only specious but also serves to highlight the distinction between private obligations and those that arise out of public employment.

MCL 691.1408(1) only allows a governmental agency to indemnify an employee for a

judgment "as a result of a civil action for personal injuries…while in the course of his or her employment and while acting within the scope of his or her authority." Neither a car payment nor unpaid student loan result from "a civil action for personal injuries" or otherwise fall within the plain language of the indemnification provision.

A private citizen can sign a car note or take out a student loan. These are purely private acts that have nothing to do with position or authority conferred by the state. Only a district court chief judge (or other administrator so authorized) *through their official acts,* can terminate a district court employee or deprive her of a pre-termination hearing. It is only through these *official actions* taken by individuals in their official capacity that expose them to personal liability under *§ 1983.* See, *Hafer v Melo,* 502 US 21 (1991). This is how Somers incurred his personal liability to Pucci.

Appellee suggests that Somers's timing and motive in adopting the indemnification policy renders it invalid. This too is wrong. MCL 691.1408(a) makes no reference to timing, motive or intent. In addition, any nefarious purpose ascribed to Somers's adoption of the policy was nullified and rendered moot by Judge Wygonik when, *after judgment was entered,* he ratified the indemnification policy and specifically promised that Appellee would indemnify Somers for the *Pucci* judgment.[8]

As a practical matter, court administrators must make daily decisions concerning the operation of the court and management of its personnel. Among other things, court administrators must decide who to hire, fire, promote, demote and discipline. Chief judges must supervise their colleagues and report them to SCAO if, in their eyes, they fail to properly perform their jobs. MCR 8.110(C)(4). Court employees must engage and interact with the public. Execution of these

[8] Plaintiff also argued below that Pucci could also enforce the indemnification policy as a third party beneficiary. MCL 600.1405(1).

responsibilities entails the inherent risk of litigation and personal liability. This is a simple reality which cannot be ignored.

Without the option of indemnification, administrators and employees may refrain from conscientiously performing their jobs because of the tangible fear of personal exposure and loss of personal assets. Because the interests of the local funding unit may be different from those of the district court (as pointedly demonstrated by this case), only the chief judge, on behalf of the court, may decide whether to indemnify the employee where the injury inflicted occurs "while in the course of employment and while acting within the scope of his or her authority." MCL 691.1408(1).

C. Chief Judge Somers's Conduct in Wrongfully Terminating Plaintiff and Denying Her a Pre-Termination Hearing Occurred "While in the Course of His Employment and While Acting Within the Scope of His Authority."

Appellee argues that Somers acted outside the scope of his authority because he violated MCR 8.110(C)(3)(h). This court rule requires district court chief judges to "effect compliance by the court with all applicable court rules and provisions of law." Pucci's claims against the court itself were dismissed. There was never a finding that the court failed to comply with any "applicable court rules and provisions of law" during Somers's entire tenure as Chief Judge. Consequently, there was no violation of MCR 8.110(C)(3)(h).

Somers, by his official conduct as 19th District Court Chief Judge, violated Pucci's rights. 596 Fed Appx at 462-464. Somers was Pucci's supervisor. Their encounters all occurred in the workplace which is where Pucci's claims arose. Somers eliminated Pucci's position as Deputy Court Administrator when he implemented the same reorganization plan conceived of and promoted by his predecessor, Chief Judge Leo Foran. MCR 8.110(C)(3)(d) expressly authorized Somers to eliminate Pucci's position. Among other things, the reorganization reduced the number

of administrators from three to two, where it remains. 596 Fed Appx at 464. SCAO never objected to the reorganization and never directed it altered in any way.

By statute and court rule, Somers had the express authority over all personnel matters, including the power to reorganize the court and eliminate positions, including Pucci's. MCR 8.110(C)(3)(d). The fact that personal animus was a motivating factor for his decision to terminate Pucci did not lessen his authority to do it.[9] As held in *Petipren v Jaskowski*, 494 Mich 190, 206 (2013) "An official's motive or intent has no bearing on the scope of his or her executive authority" under MCL 691.1407(5). While MCL 691.1407(5) and MCL 691.1408(1) may differ in some respects, their use of "scope of authority" does not. "When ascertaining intent, we read differing statutory provisions to produce a harmonious whole." *Bailey v Oakwood Hosp & Med Ctr*, 472 Mich 685, 693 (2005). Under well-settled rules of statutory construction, intent or motive does not matter for purposes of the GTLA unless the statute says otherwise.

Appellee relies on *Slanga v City of Detroit*, 152 Mich App 220 (1986), *Lowrey v Dep't of Corrections*, 146 Mich App 342 (1985) and similar cases for the general rule that, for purposes of *respondeat superior* liability, an employee's intentional tort falls outside the scope of the employee's authority.[10] *Slanga* involved a false arrest and *Lowrey* involved an assault on an inmate

[9] Appellee cites Pucci's closing arguments to the jury as evidence that Somers's personal animus was the only reason he terminated Pucci. This is wrong. Closing arguments are not evidence. *People v Gursky*, 486 Mich 596, 632 (2010). More importantly, the Sixth Circuit held the jury "…decided that retaliating against Pucci for her complaints to the SCAO formed at least part of Somers's motive. In order to do so, the jury must have rejected the view that reorganization alone motivated the termination." *Pucci v Nineteenth Dist Court*, 596 Fed Appx 460, 475 (2015). There was never a finding that Somers's only reason for the reorganization was his personal animus toward Plaintiff.

[10] 42 USC § 1983 created "a species of tort liability" in favor of persons deprived of federally secured rights. *Carey v Piphus*, 435 US 247, 253 (1978); *Imbler v Pachtman*, 424 US 409, 417 (1976).

by prison guards. None of the cases cited by Appellee involved employment claims, indemnification, or the GTLA.

Michigan law holds that, for purposes of vicarious liability, an employee acts within the scope of his authority where the employer places him in a position where he can commit the intentional act and furnishes him with the necessary instrumentality. *Hill v Mitchell*, 653 F Supp 1194 (ED Mich, 1986) relying on *Stewart v Napuche*, 334 Mich 76 (1952) and *Graves v Wayne County*, 124 Mich App 35 (1983) (employer liable under theory of *respondeat superior* for intentional tort committed by an off duty police officer).[11] As a matter of law, Somers was only able to terminate Pucci because of his position and authority as 19th District Court Chief Judge.

Contrary to Appellee's assertion, Somers's firing of Pucci had everything to do with the "business of the court" irrespective of his personal motive or intent. As a matter of law, Somers was acting "in the course of employment and within the scope of his…authority" when he terminated Pucci and deprived her of a meaningful pre-termination hearing. Had he not been acting in the course of his employment and within the scope of his authority, he could not otherwise have done so. Somers's wrongful conduct is exactly the type contemplated for indemnification under MCL 691.1408(1).

ACCORDINGLY, the Court should reverse the decision of the Court of Appeals and remand this case to the trial court for entry of judgment in Plaintiff's favor.

Respectfully submitted,

/s/ Joel B. Sklar

Dated: August 15, 2017 Joel B. Sklar (P38338)

[11] For purposes of vicarious liability, the question is whether the employee "could in some way have been held to have been promoting his master's business." *Bryant v Brannen*, 180 Mich App 87 (1989). Nowhere does Appellee suggest that its business interests were not somehow furthered by the administrative reorganization.